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J. Mark Morrow

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ALSTON & BIRD LLP

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101 SOUTH TRYON STREET, SUITE 4000

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EXAMINER

THAKUR, VIREN A

ART UNIT

PAPER NUMBER

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**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

## Office Action Summary

Application No.

10/812,451

Applicant(s)

MORROW, J. MARK

Examiner

Viren Thakur

Art Unit

1761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 17 July 2007.
- 2a) ☐ This action is FINAL. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1,2 and 4-27 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1,2 and 4-27 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_

- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_

**DETAILED ACTION**

***Continued Examination Under 37 CFR 1.114***

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on July 17, 2007 has been entered.

***Response to Amendment***

2. Those rejections that have not been repeated within the Office Action are considered withdrawn.

***Claim Rejections - 35 USC § 112***

3. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

4. **Claims 11 and 24 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.**

Regarding claims 11 and 24, the phrase "such that" renders the claim indefinite because it is unclear whether the limitations following the phrase are part of the claimed invention. See MPEP § 2173.05(d).

5. **Claim 22 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.**

The instant claim recites wherein "the skirt of the cup holder is flared radially outwardly in a direction toward a lower end of the skirt." It is unclear as to how the skirt of the cup holder can extend toward itself. Furthermore the claim is unclear as to from what the skirt of the cup holder flares radially outwardly.

***Claim Rejections - 35 USC § 102***

1. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

2. **Claims 1-2, 4-10, 14-17, 19-21 and 21 are rejected under 35 U.S.C. 102(b) as being anticipated by Muraoka (US 4018904).**

The limitations of Muraoka are taken as cited in the Office Action, mailed December 13, 2006.

On page 6 of Applicant's reply, Applicant asserts the reasoning stated by the Examiner completely ignores the fact that original Claim 3 (and not in Claim 1 as amended) recites "the locking features comprise a projection formed on one of the cup holder and primary container and a recess formed on the other of the cup holder and primary container, the projection engaging the recess in the serving configuration." Applicant has amended the claims to incorporate the limitations of original claim 3 into independent claim 1. Regardless, this argument has been fully considered but is not deemed persuasive. As stated on column 3, lines 1-9, Muraoka discloses that the ribs (16 and 17) are engaged with the projections (11) to permit the inner receptacle to be snugly fitted into the outer receptacle. Although cited as projections, the Examiner as interpreted the projections as recesses, since, as can be seen from figure 1, that the inner walls of the outer container form a recess which engages the ribs of the inner container. Therefore, since the ribs are engaged with the recesses thus creating a "snug" fit, the Examiner respectfully asserts that Muraoka teaches locking features, as recited in amended

claim 1. Regarding complementary locking features, the Examiner respectfully asserts that since Muraoka discloses a "snug fit" as the means for securing the inner receptacle with the outer receptacle, that the locking features as disclosed above would inherently have locked the receptacles together. In Applicant's arguments filed after the Final Rejection, Applicant states that "locking" clearly connotes something more than mere friction between walls; however, the Examiner respectfully asserts that if the friction between walls, as disclosed by Muraoka, provide a "snug" fit which does not result in easy removal of the inner receptacle from the outer receptacle, that such friction would have been deemed a locking feature. Regarding the limitation of complementary, Applicant had provided two definitions for complementary and a definition for complement. In each case, complementary or complement is referred to as interacting with each other such that they mutually complete each other. Since the ribs (16 and 17) engage the recesses (11), the Examiner respectfully asserts that the ribs interact with the recesses to complete each other. They supply mutual needs, in this case, to secure the inner receptacle to the outer receptacle in a locking type fashion. Regarding the limitation of the projection engaging the recess in the serving configuration, the Examiner further asserts that the serving configuration is a future state of the receptacle and in order to meet the claimed limitations, the prior art need only be capable of being converted into a serving configuration. Therefore, as discussed in the Office Action, mailed December 13, 2006, since the inner receptacle is capable of being inverted with the outer receptacle into a serving configuration, the projections and ribs would also have been capable of being engaged in a similar fashion.

**3. Claims 1, 10, 18, 20 and 21 is rejected under 35 U.S.C. 102(b) as being anticipated by Stewart (US 4909394).**

Stewart discloses a package capable of containing a food product wherein a liquid is mixed with the food product and the package is also a vessel for the preparation as well as at container in which the food product is served. Stewart discloses a primary container (Figure 2, Item 12) comprising a tapered plastic cup (Figure 2, Item 12 and Column 5, Lines 13-18), having a radially outwardly projecting rim at the top end of the cup (Figure 2, See Item Analogous to 20 on the primary container). Stewart also discloses a cup holder (Figure 2, Item 10) comprising a tapered plastic cup (Figure 2, Item 10 and Column 5, Lines 13-18) having radially outwardly projecting flange (Figure 2, Item 20) at a top end thereof. The cup holder is considered nested in the primary container when the package is in a packaged configuration.

The cup is also considered capable of being removed or "removable" from the primary container such that the package can be capable of being converted into a serving configuration wherein the primary container is nested inside the cup holder with a side wall of the cup holder surrounding a side wall of the primary container. The examiner asserts that this claimed language is functional language and thus if the prior art meets the structural limitations of the claim, then the prior art would have been capable of performing the intended use. In this case, the prior art would have been capable of being nested in a "serving configuration." Stewart further discloses complementary locking features comprising a radial projection on the primary container (Figure 2, Item 36) and a recess on the cup holder (Figure 2, Item 28), as recited in instant claim 4.

As recited in instant claim 10, Stewart teaches a food product contained in the package in the packaged configuration (Column 5, Lines 45-48).

As recited in instant claim 18, Stewart teaches a dry food product such as beverages (Column 1, Lines 19-29). Since Stewart discloses the cups to be vended and to also include a food product therein which requires hydration, Stewart inherently teaches products that are drunk, i.e. beverages.

As recited in instant claim 19, Stewart discloses wherein the cup holder and primary container are thermoplastic (Column 1, Lines 14-16). The thermoplastic materials such as polystyrene used by Stewart are well known to be thermoformed.

#### ***Claim Rejections - 35 USC § 103***

4. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

5. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

Art Unit: 1761

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

**6. Claims 1, 4-6, 10, 18, 19, 20, 21 are rejected under 35 U.S.C. 103(a) as being unpatentable over Tai (US 6138862) in view of Stewart (US 4909394) and Schnakenberg (US 1366839).**

Tai is relied on to teach that two similarly configured containers have been well known in the art to be used for providing heat insulation between the contents within the cup and the user's hand (See Figure 3 and Column 1, Lines 18-29). Tai further teaches flanges on the primary container and the cup holder (Figure 3, See Tops of Item 1 and 2) and further teaches wherein each of said primary container and the cup holder are comprised of plastic (Column 3, Lines 29-31).

The claims further differ from the prior art in teaching complementary locking features on the cup holder and the primary container for locking the primary container into the cup holder, wherein the locking features comprise a radial projection from on one of the cup holder and primary container and a recess formed on the other of the cup holder and primary container.

Stewart teaches complementary locking features (Figure 4, Item 30, 32, 34) for the purpose of providing an effective seal between two like cups when nested together, thus preventing inadvertent dislodgement of the two cups while drinking therefrom (Column 4, Lines 17-38). Regarding instant claim 4, Stewart teaches the recess formed on the inner surface of the cup holder (Figure 2, Item 28) and the projection formed on the outer surface of the primary container (Figure 2, Item 36). Regarding instant claim 5, the groove and the projection of Stewart extend circumferentially about the two containers.

Based on these teachings, it would have been obvious to one having ordinary skill in the art to use the complementary locking features as taught by Stewart, for the cup structure of Tai for the purpose of providing an effective seal between the cups, when nested, which would have prevented inadvertent dislodgement between the two cup while drinking therefrom.

Regarding instant claim 6, the claims differ in providing a secondary raised region and a second recessed region. Nevertheless, to provide a second recess and projection would only have provided further securement of the two containers. Although the combination of the prior art only teaches one recess and projection, the Examiner asserts that providing a second

recess and raised region would have been a duplication of the first recess and projection and thus would not have provided a patentable distinction over the prior art (See MPEP 2144.04 VI).

Regarding instant claim 10, Tai is silent in teaching wherein a food product is contained the package in the packaged configuration and wherein the food product is a dry beverage mix, as recited in instant claim 18; however, Stewart teaches nested thermoplastic cups and further teaches providing an effective seal between the two cups (Column 2, Lines 65-67) and further teaches that providing a beverage concentrate, for hot or cold beverages, between thermoplastic cups as been primarily unsuccessful in the prior art due to ineffective seals for preventing the ingress of moisture (Column 1, Lines 19-29). Stewart further teaches comestibles stored in the bottom of one cup with another cup placed into said cup with the comestible, thus providing the sealed container (Column 5, Lines 45-67). Schnakenberg is also relied on to teach a dry beverage product between two nested containers. Schnakenberg also teaches that the two containers can be used together for the purpose of providing more efficient mixing of the beverage (Page 1, Column 2, Lines 102-104). Based on these teachings, it would have been obvious to one having ordinary skill in the art to add a beverage concentrate in between the container structure of modified Tai for the purpose of providing a packaged beverage (either hot or cold) which can be vended while also providing the convenience of the heat insulating properties, as taught by Tai. Additionally, by providing the beverage between two containers, the two containers could also have been used to aid in mixing the contents when water was added therein, as taught by Schnakenberg.

Regarding instant claim 11, the prior art is silent in teaching wherein the cup holder is shorter than the primary container such that in the packaged configuration a space is defined between a bottom wall of the cup holder and a bottom wall of the primary container, the food product being disposed in said space. The combined teachings of Tai, Stewart and Schnakenberg teach the food product being disposed in a space between the cup holder and the primary container. Therefore, the physical length of the cup holder is considered a change in size which would not have resulted in the prior art performing different than the instantly claimed invention (See MPEP 2144.04 IV A), since it appears that the purpose of the length of the cup holder is to allow for the space into which the food product is disposed.

Regarding instant claim 19, Tai teaches flanges however is silent in teaching wherein said flanges are flat. Nevertheless, to change the shape of the flange to a flat flange would have been a matter of choice which would have been obvious to a person having ordinary skill



in the art. Instant claim 19 only appears to change the shape of the flange and therefore such as change would have been an obvious matter of choice absent persuasive evidence that the particular configuration of the flange of the primary container, as claimed, is significant.

Regarding instant claims 20 and 21, Tai teach wherein the containers are comprised of plastic. Tai is silent in teaching thermoformed and thermoplastic containers but teaches wherein the cups are comprised of plastic, as discussed above. Stewart is relied on to teach that cups, which are similar to those of Tai, comprised of thermoplastic material have been well known to be thermoformed. Furthermore, thermoforming containers comprised of plastic has been a well-known technique for forming plastic cups. Therefore, it would have been obvious based on the knowledge of the ordinarily skilled artisan that the plastic of Tai would have been thermoplastic, since plastic has been well known to be thermoformed into the plastic containers.

**7. Claims 2, 19 are rejected under 35 U.S.C. 103(a) as being unpatentable over Tai, Stewart and Schnakenberg as applied to claims 1, 4-6, 10, 18, 19, 20 and 21 above, and in further view of Rasanen (WO03068613).**

Tai, Stewart and Schnakenberg are taken as applied above.

The claims differ from the prior art in teaching wherein an elongated skirt depends from the flange of the cup holder such that a channel is defined between the skirt and the side wall of the cup holder, the channel of the cup holder being configured to receive the rim of the primary container when the package is in the packaged configuration.

Rasanen et al., teach containers that have been similarly arranged as that of modified Schnakenberg, as can be seen in Figure 5. Rasanen et al. teach flanges extending radially outward from the top of the containers (Figure 5, Items 6) and further teach wherein skirt structures (Figure 6, Item 13) can be applied for the purpose of forming a channel between the wall of the cup and the flange and preventing the flange (Item 6) from being pressed against the cup. As a result, the skirt structures also are used as reinforcement and maintaining the heat insulating air slot between the flange and the cup wall (Page 4, Line 34 to Page 5, Line 6). In addition, Rasanen et al., teach wherein the flanges with the skirts structures can extend the length of the cup for the purpose of providing stability to the cups (See Figure 9 and Page 5, Lines 32-37).

Based on these teachings, it would have been obvious to use the flange and skirt structures for the container assembly of Tai, as taught by Rasanen et al. for the purpose of

providing reinforcement to the cup as well as providing heat insulating properties so as to prevent a hot drink from burning the user's fingers. Nevertheless, it would have been obvious to the ordinarily skilled artisan that extremely cold drinks could also provide an uncomfortable feeling to the user's hands and thus the flanges as taught by Rasanen et al., would have also have provided insulation against cold drinks. Additionally, such extending skirt structures, as taught by Rasanen et al., would have provided enhanced stability and allowed for narrower and more tapered cups and to provide balance for heavier drinks which could cause the cup structure to tip over.

In an alternative interpretation and in the event that the flat flanges provide a patentable distinction, instant claim 19 further differs from the prior art in teaching a flat flange. Nevertheless, Rasanen is relied on to teach flat flanges with skirt structures extending therefrom, for the purpose of providing a channel of air that insulates the contents from the user's hands. Therefore, it would have been obvious to one having ordinary skill in the art to use flat flanges as taught by Rasanen for the purpose of creating the insulating air channel.

**8. Claim 23 is rejected under 35 U.S.C. 103(a) as being unpatentable over Tai, Stewart, Schnakenberg and Rasanen as applied to claims 2 and 19 above, and in further view of Holly (US 3246786) and Shelby (US 3374922).**

Tai, Stewart, Schnakenberg and Rasanen are taken as applied above.

The combination of the prior art is silent in teaching wherein the lower end of the skirt includes a radially outwardly projecting flange.

Shelby teaches a nestable container wherein the inner nested container (Figure 3, Item 10) comprises a flange (Figure 3, Item 11) a skirt (Figure 3, Item 13) and a flange extending from said skirt (Figure 3, Item 12). Shelby teaches that an extending flange from the skirt structure is a well known rim structure for nestable containers. To provide an outwardly extending flange from the skirt would have been a matter of design choice to the ordinarily skilled artisan, since Shelby teaches that such designs have been known in the art. Therefore to provide an outwardly extending flange on the nestable containers would not have provided a patentable feature over the prior art.

Holly teaches an outwardly projection flange extending (Figure 2 and Figure 3, Item 32) from the lower end of a skirt (Figure 2 and Figure 3, Item 28). The container of Holly is analogous to that of the combined prior art since Holly also teaches wherein the nested

container also acts as a cup holder for the cup (Item 14). The flange extending from the skirt provides a secured snap tight fit between the cup holder and the cup. Additionally, it would have been obvious to the ordinarily skilled artisan that an extending flange would have

9. **Claims 7-9, 12-17, 24, 25 and 27 are rejected under 35 U.S.C. 103(a) as being unpatentable over Tai in view of Stewart (US 4909394) and Schnakenberg (US 1366839) as applied to claims 1, 4-6, 10, 18, 19, 20, 21 above, and in further view of Muraoka (US 4018904). Sorensen (US 5425497) is cited as evidence, as discussed below.**

Tai, Schnakenberg and Stewart are taken as applied above. The combination of the prior art is silent in teaching ribs as spacers on the side walls of the cup holder, as recited in instant claims 7-9.

Muraoka teaches a cup holder (Figure 1, Item 3) which can further comprise a ribbed corrugation (Figure 2) for the purpose of provide gaps of air space between the cup holder and the primary container (Column 2, Lines 24-30). By providing air space along the side walls of the container, it would have been obvious to the skilled artisan that such corrugation in the cup holder would have provided insulation against the side walls of the container when in a "serving configuration." Therefore, based on the teachings of Muraoka in combination with the knowledge of one having ordinary skill in the art, it would have been obvious to the ordinarily skilled artisan to provide ribs, such as those taught by Muraoka, on the cup holder of modified Tai, since Tai teaches a container structure for hot beverages, for the purpose of providing air space between the walls of the two containers for providing insulation between the user's hand and the walls of the primary container. This is further evidenced by Sorensen, who teaches an insulating cup holder that provides an air space between the outer cup holder and the cup for the purpose of providing added insulation for the user.

Regarding instant claims 12, 13 and 15-17, the prior art is silent in teaching a membrane and a wrapper comprising a shrink film sealed to the top end of the cup holder for sealing the food product in the package and wherein a wrapper is wrapped about at least the top ends of the cup holder and primary container in the packaged configuration.

Muraoka further teaches a membrane (Figure 1, Item 4) sealed to the top end of the cup holder (Column 1, Lines 63-66), and a wrapper comprising a shrink film (Column 2, Lines 30-33) applied to the top ends of the cup holder and primary container in the packaged configuration, which thus protects the contents therein. Muraoka teaches that the shrink film comprise

polypropylene (Column 2, Lines 32-33), which has been well known to the ordinarily skilled artisan to have excellent moisture barrier properties. (See Permeability and Other Film Properties of Plastics and Elastomers). Since the food product can be placed in either of the containers, as discussed above, by providing a moisture impermeable shrink film, as taught by Muraoka, would have provided a moisture impermeable seal regardless of the placement of the food product within the package.

The claims further differ from the prior art in teaching wherein the food product is contained in the cup holder in the packaged configuration, as recited in instant claim 14.

Muraoka teaches wherein the food product is contained within the cup holder, in the packaged configuration. And further teaches a sealing membrane (Figure 1, Item 4) with shrink film (Figure 1, Item 5) for protecting the food product contained therein. Since Muraoka teaches providing a sealing membrane and a shrink film for protecting the food product contained within the package, it would have been obvious to the ordinarily skilled artisan that to place the food product between both of the containers of modified Tai or in the inner nested "cup holder" would have been a rearrangement of parts which would not have modified the operation of the combined teachings of the prior art (See MPEP 2144.04 VI), since Muraoka teaches providing a seal over both of the containers in the packaged configuration, for the purpose of preventing contamination.

Regarding instant claim 24, the prior art is silent in teaching a shrink film wrapped about the top ends of the cup holder and primary container, wherein the shrink film extends at least partway along the length of the primary container, the shrink film including a line of weakness allowing an upper portion of the shrink film to be detached from a lower portion of the shrink film and removed from the package while the lower portion of the shrink film remains wrapped about the primary container.

Muraoka discloses a shrink film wrapped about the top ends of the cup holder and primary container, and extending completely around the entire package (Figure 1, Item 5) and further discloses a line of weakness (Figure 1, Item 22) allowing an upper portion of the shrink film to be detached from a lower portion of the shrink film. In removing the top portion of the shrink film, said lower portion of the shrink film is still wrapped around the outer. It would have been obvious to the ordinarily skilled artisan to provide a line of weakness as taught by Muraoka for the purpose of providing an easier more efficient means of removing the shrink-wrap from the package.

Regarding instant claim 25, the prior art is silent in teaching printing of visual elements. However, adding printed material onto the package is merely an aesthetic design change, which would not provide a patentable feature over the prior art. (See MPEP 2144.04) Nevertheless, printing visual elements to the food package of modified Tai, would have been obvious for the purpose of promoting the package and making said package visually appealing to the consumer.

Regarding instant claims 27, the shrink film of Muraoka is applied to the top of the cup holder in the packaged configuration, as discussed above. As further discussed above, since the shrink film is polypropylene, it would provide moisture barrier properties. Regarding the materials of the cup holder and primary container, Stewart teaches providing a "complete seal" as a result of the locking mechanism for the purpose of improving on the prior art which failed to provide an adequate barrier to the atmosphere and to moisture (Column 1, Lines 19-29). Schnakenberg also similarly teaches providing moisture impermeability so as to prevent the ingress and contamination of the dry beverage product. (Page 1, Column 1, Lines 14-22). Therefore it would have been obvious to the ordinarily skilled artisan to use a moisture impermeable material for the container for the purpose of preventing moisture from contaminating the dry beverage contents.

- 10. Claim 26 is rejected under 35 U.S.C. 103(a) as being unpatentable over Tai (US 6138862), Schnakenberg (US 1366839), Stewart (US 4909394) and Muraoka (US 4018904) as applied to claims 7-9, 14-17, 24, 25 and 27, above, and in further view of Candy (US 5938015).**

Tai, Schnakenberg, Stewart and Muraoka, are taken as applied above. Muraoka teaches applying a shrink film across the opening of the package as a means of sealing the package.

Regarding instant claim 26, the prior art is silent in teaching wherein the shrink band wrapped about the top ends of the cup holder and primary container to seal the package and hold the primary container and cup holder together terminate such that the cup holder remains open at the top end.

Candy teaches nestably stacking containers with a sealed compartment. Candy teaches that the sealed compartment that comprises the food material only comprises a small portion of the entire package and it has been known in the prior art to apply a seal at the lip of the container to prevent tampering. However, Candy teaches, this results in large amounts of

empty space and makes storing and shipping less efficient (Column 1, Lines 5-38). As a result, Candy teaches providing the seal situated between the lip and the base of the container to define a compartment to accommodate a product while still allowing nesting of the containers (Column 1, Lines 25-37).

Based on these teachings it would have been obvious to minimize the excess space that would usually prevent the more efficient storage and shipping, as taught by Candy, by extending the shrink film into the opening of the nested cup holder, thus allowing the nesting of the containers. Such a modification would have still allowed for the use of the polypropylene moisture barrier as taught by Muraoka but would have further minimized storage space and provided more efficient shipping of the packages.

**11. Claims 1-10, 14-17 and 19-25 are rejected under 35 U.S.C. 103(a) as being unpatentable over Muraoka (US 4018904) in view of Stewart (US 4909394).**

In the event that the language of Muraoka, as discussed above is not construed as complementary, the following rejection under 35 U.S.C. 103(a) has been set forth. Muraoka discloses a package for containing a food product (Figure 1) that is prepared for consumption by mixing with liquid, the package serving as a vessel for the preparation as well as a container in which the prepared food product is served (Column 1, Lines 6-11), the package comprising: a primary container (Figure 1, Item 2) comprising a tapered plastic cup (Column 2, Lines 33-36) having a radially outwardly projecting rim at a top end of the cup (Figure 1, Item 12); and a cup holder (Figure 1, Item 3) comprising a tapered plastic cup (Column 2, Lines 57-58) having a radially outwardly projecting flange at a top end thereof (Figure 1, Item 18) and an elongated skirt depending from the flange (Figure 1, Not Labeled – See downwardly point skirt next to Item 18) such that a channel (Figure 1, See Next to Item 12) is defined between the skirt and a side wall of the cup holder. Regarding the nestability of the cup holder and the outer container, Muraoka discloses a cup holder that is nested within an outer container by “snugly receiving the cup holder within the outer container.” The cup holder and the outer container are not sealed together and as can be seen by Figure 1, both the cup holder and the primary container contain a congruency that would allow the primary container to be nested within the cup holder; thus said cup holder and primary container are configured to and capable of being nested reversibly. The structure of the cups as shown in Figure 1 demonstrate that said cups can be nestable within each other. Nevertheless, this is the intended use of the invention which is met if the

prior art recites the structural limitations of the claim. Muraoka disclose locking features on the cup holder (Figure 1, Item 16 and 17) and the primary container (Figure 1, Item 8 and 10) for locking the primary container into the cup holder in the serving configuration of the package. Since said cups are configured to be nestable within each other and contain locking features, said cups are capable of locking in the serving configuration of the package. This is an intended use that is met by meeting the structural limitations.

Regarding instant claim 1, Muraoka is silent in teaching wherein the locking features are complementary and further comprising a radial projection formed on one of the cup holder and primary container and a recess formed on the other of the cup holder and primary container.

Stewart teaches nestable containers comprising a recess in the cup holder (Figure 2, Item 28) and a projection in the primary container (Figure 1, Item 26) (when considered in the packaged configuration). Stewart further teaches a food product disposed between said cups (Column 5, Lines 45-48) and complementary locking features that prevent separation of the cups during "normal conditions" until a "suitable dispensing force is applied to the lower cup" (Column 4, Lines 33-38). Based on the teachings of Stewart, the prior art teaches both locking features which secure the cup holder of Muraoka in place, as well as complementary locking features for securing two nestable containers in place. Therefore, to the ordinarily skilled artisan the prior art teaches two types of locking features for nestingly securing two cups together. Thus to use complementary locking features versus any other locking feature would have been an obvious substitution of locking means known for performing the same purpose. Thus, complementary locking features would not have provided a patentable feature over the prior art (See MPEP 2144.06).

Regarding instant claims 22 and 23, Muraoka is silent in teaching wherein the skirt is flared radially outwardly toward the lower end of the skirt and wherein the lower end of the skirt includes a radially outwardly projecting flange.

However, the skirt and radially extending flange at the lower end of the skirt of Muraoka perform similar functions as that of the Applicant's invention. It would have been obvious to one having ordinary skill in the art that extending skirt structures would assist the consumer in disengaging the cup holder from the outer container, since the extension of the skirt structures provides a greater area that the user can grasp the cup holder so as to remove it from its nested position; therefore changing the direction does not change the function and would not provide an inventive step over the prior art.

Regarding instant claim 25, Muraoka is silent in teaching printing of visual elements; however the invention of Muraoka discloses visual elements. Adding printed material onto the package is merely an aesthetic design change, which would not provide a patentable feature over the prior art. (See MPEP 2144.04) Nevertheless, printing visual elements to the food package of Muraoka would have been obvious for the purpose of promoting the package and making said package visually appealing to the consumer.

Regarding instant claim 4, Muraoka discloses the package of claim 3, wherein the recess is formed in an inner surface of the cup holder (Figure 1, Items 16 and 17) and the projection is formed on an outer surface of the primary container (Figure 1, Items 8 and 10). Since both said cups comprise projections the opposite side of each projection is a recession; therefore, depending on the configuration both cups recite a projection and a recession in the same location.

Regarding instant claim 5, Muraoka discloses, the package of claim 4, wherein the recess comprises a groove extending circumferentially about the inner surface of the cup holder (Figure 1, See circumferential recess in near item 16 and 17), and the projection comprises a raised region extending circumferentially about the primary container (Figure 1, See circumferential projection near item 8 and 10).

Regarding instant claim 6, Muraoka discloses the package of claim 5, wherein the cup holder includes a second recess (Figure 1, Items 16 and 17), the recesses being axially spaced, and the primary container includes a second raised region (Figure 1, Items 8 and 10), the raised regions being axially spaced.

Regarding instant claim 7, Muraoka discloses, the package of claim 1, further comprising spacing members formed on one of the cup holder (Figure 1, Item 13, 14, 16 and 17) and primary container (Figure 1, Items 7, 8, and 10) for spacing a side wall of the cup holder from a side wall of the primary container in the serving configuration of the package, whereby the cup holder provides thermal isolation from the primary container (Column 3, Lines 21-23). Additionally, the recesses and projections that lock the cup and primary container in each nesting configuration are also the spacing members a side wall on one of the cup holder and primary container. Furthermore, since the invention of Muraoka comprises cups which are nestable within each other and comprise spacing members that create space between said cups, then said cups are thus capable of creating said spacing when in said serving configuration.



Regarding instant claim 8, Muraoka discloses the package of claim 7, wherein the spacing members comprise ribs (Figure 1, Items 13 and 14).

As recited in instant claim 9, Muraoka discloses the package of claim 8, wherein the ribs project inwardly from an inner surface of the side wall of the cup holder and abut an outer surface of the side wall of the primary container in the serving configuration (Figure 1, Items 13 and 14). Since the serving configuration is a future state of the package of claim 1, Muraoka discloses a package wherein said cups are nestable within each other, said cups are capable of being configured in the serving configuration. Thus, said ribs of the cup holder will abut the sidewall of the outer container when in said serving configuration.

Regarding instant claims 10 and 14, Muraoka discloses the package of claim 1, comprising a food product contained in the package in the packaged configuration (Figure 1, Item A).

Regarding instant claims 15 and 16, Muraoka discloses a membrane (Figure 1, Item 4) sealed to the top end of the cup holder (Column 1, Lines 63-66) and further comprising a wrapper wrapped about at least the top ends of the cup holder and primary container in the packaged configuration (Figure 1, Item 5).

As recited in instant claim 17, Muraoka discloses wherein the wrapper comprises a shrink film (Column 2, Lines 30-33). As recited in instant claim 19, Muraoka discloses wherein the rim of the primary container comprises a flat flange (Figure 1, Item 12), wherein the primary container and cup holder comprise thermoplastic (Column 2, Lines 33-26 and 57-58). Muraoka discloses polystyrene which is a thermoplastic.

Regarding instant claim 21 it is known that thermoplastics require thermoforming to take the shape of an object.

As recited in instant claim 24, Muraoka discloses a shrink film wrapped about the top ends of the cup holder and primary container, and extending completely around the entire package (Figure 1, Item 5) and further discloses a line of weakness (Figure 1, Item 22) allowing an upper portion of the shrink film to be detached from a lower portion of the shrink film. In removing the top portion of the shrink film, said lower portion of the shrink film is still wrapped around the outer container when said package is converted into the serving configuration.

- 12. Claims 11, 12, 18 and 27 remain rejected under 35 U.S.C. 103(a) as being unpatentable over Muraoka (US 4018904) and Stewart (US 4909394), as applied to claims 1-10, 14-17, 19-21 and 24, above, and in further view of Syverson et al. (US 3227273).**

Regarding instant claim 27, Muraoka teaches as cited in the prior Office Action, mailed December 13, 2006. Muraoka also teaches wherein the synthetic resin used to form the cups should not be deformable by hot water (Column 2, Lines 33-36). The examiner also notes that Muraoka teaches polystyrene as an example of a synthetic resin used to form the cups. However, Muraoka is silent in teaching wherein at least one of the cup holder and primary container comprise barrier materials, as recited in instant claim 27.

Syverson teaches that the dehydrated "beverages such as coffee, tea and chocolate are powdery or granular and are characterized by an attraction for moisture whereby, when exposed to the atmosphere or water vapor, they absorb the moisture to form a liquid or sticky mass." (Column 1, Lines 69 to Column 2, Line 2). Similar to Muraoka who uses a heat shrink film and a hermetically sealed covering (Figure 1, Item 4) which preserve and protect the instant food within the container, Syverson recognized the problem of requiring a moisture barrier to maintain the dry state of the beverage, and further attempted to solve the problem by using cups coated with plastic that form a water tight seal between the two cups (Column 2, Lines 18-19), and vacuum sealing and heat shrinking a film to wrap the entire package to prevent the entry of moisture. Therefore, given the teachings of Syverson it would have been obvious to modify Muraoka as taught by Syverson to use a material for the cups that prevents moisture from entering the package. Such a modification prevents water vapor from entering the package during storage from becoming a sticky mass and becoming hardened as a result. Furthermore, using a non-deformable plastic provides motivation to one having ordinary skill in the art to use a moisture barrier material so as to prevent the heat and vapor of the hot water from absorbing into the cup so as to degrade the structure of the cup. Additionally, it would have been obvious to use a moisture barrier material for the invention of Muraoka because using a moisture absorbent material for cups that hold hot food products will result in the eventual degradation of the cup itself. If the material used for the cup absorbs moisture the user would not be able to hold a hot beverage without burning his hand.

Regarding instant claim 12, Muraoka discloses a wrapper wrapping about at least the top ends of the cup holder and primary container in the packaged configuration.

Regarding instant claim 13, Muraoka discloses wherein said wrapper is a shrink film (Column 2, Lines 30-33).

Regarding instant claim 18 Muraoka discloses as cited above. Muraoka further discloses adding water to a dry "instant food" so as to rehydrate the dried food (Column 3, Lines 31-36). Muraoka is silent in teaching wherein the food product comprises a dry beverage mix. Syverson teaches nestable cups that contain a dry beverage stored between said cups wherein said dry beverage is rehydrated with water to form the beverage (Column 1, Line 69 to Column 2, Line 5). Although Muraoka only teach an example comprising soup, it would have been obvious to one having ordinary skill in the art that a soup is both eaten and drunk. The broth that forms as a result of adding the water is a beverage. Since Syverson teaches providing a dry beverage powder within a food package comprising two cups (Column 1, Line 70 to Column 2, Line 2), the concept of adding a dried product in a cup that requires water to rehydrate form the food product is a known concept regardless of the type of product to be rehydrated.

### **Conclusion**

13. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

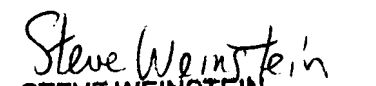
Any inquiry concerning this communication or earlier communications from the examiner should be directed to Viren Thakur whose telephone number is (571)-272-6694. The examiner can normally be reached on Monday through Friday from 8:00 am - 4:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571)272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Viren Thakur  
Examiner  
Art Unit: 1761

  
STEVE WEINSTEIN  
PRIMARY EXAMINER 1761  
8/3/07